

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: . Adv. Proc. No. 12-06131
. (TJT)
RALPH ROBERTS REALTY, LLC, .
Plaintiff, . Detroit, Michigan
March 4, 2014
.
v. .
.
JON SAVOY, ET AL., .
.
Defendants. .
• • • • • • • • • • • • • • •

CLOSING ARGUMENTS
BEFORE THE HONORABLE THOMAS J. TUCKER
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Plaintiff: Law Offices
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Recorder: JAMIE LASKASKA

Transcriber: STEPHEN C. BOWLES

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1 || (Proceedings commenced at 9:09 p.m.)

2 MS. MCCOLLUM: We will call the matter off
3 Ralph Roberts Realty v. Savoy, 12-6131.

4 THE COURT: All right. Good morning
5 everyone.

6 Appearances, please.

7 MS. MCCOLLUM: Good morning, Your Honor.

10 MR. KWIATKOWSKI: Good morning, Your Honor.

11 Scott Kwiatkowski on behalf of the
12 Defendants.

15 This is the time for closing arguments in
16 this trial, as you know. I will say that I have read
17 the post-trial briefs filed by the parties. I'll just
18 refer to them as "post-trial briefs" but I'll leave it
19 -- they include the proposed findings of fact and
20 conclusions of law, in some instances, of course, but I
21 have reviewed those, and so we'll hear closing
22 arguments now.

23 Ms. McCollum, as counsel for the Plaintiff
24 bearing the burden of proof in the case, you'll have an
25 opportunity for a reply closing argument if you want to

1 make one, as -- in addition to this one. Go ahead.

2 MS. MCCOLLUM: Thank you, Your Honor.

3 As you mentioned, we have done several rounds
4 a briefing in this case. I will keep this argument
5 short because I do know that you have read everything.
6 I just wanted to briefly discuss the factual issues
7 that aren't in dispute, touch on the factual issues as
8 Ralph Roberts Realty see's them, and then discuss the
9 legal issues and the conclusions that we would like you
10 to draw in favor of our position.

11 Here, in this trial, unlike in the Roger
12 Roberts trial, it's not in dispute that the Savoy
13 Defendants were actually participants in the investor
14 program. Mr. Savoy is an experienced real estate
15 professional with, I think he testified, more than 30
16 years experience and several awards, and he
17 investigated independently, all the proposed properties
18 that Ralph Roberts Realty brought to the Savoy
19 Defendants.

20 The Savoy Defendants purchased 16 properties
21 through the investor program. The terms that the
22 parties do agree on were that Realty was to receive a
23 30 percent split upon the sale of a property, and that
24 the acquisition fee would be paid in two installments.

25 Of this 16 properties, four were redeemed

1 before title could be perfected by the Defendants, and
2 those properties were Palm Beach, Ursuline and
3 Breckinridge and Eastland Realty. Eastland is where
4 Realty believes that everything was settled as a result
5 of state court litigation and settlement. The Savoy
6 Defendants dispute this, although they have not
7 presented any evidence of the costs associated with the
8 Eastland property.

9 Four of the properties that were purchased by
10 the Savoy Defendants, were sold, and the -- a 30
11 percent split was paid to Ralph Roberts Realty. Those
12 properties were Raymond, Antonia, Fox Crest and Lowell,
13 and that bears out the terms of the parties' agreement
14 with the 30 percent split and the commission that was
15 paid on each of those properties.

16 Then four properties were sold by the Savoy
17 Defendants and not -- and nothing was paid to Ralph
18 Roberts Realty. That was Ledgestone, Firwood,
19 Trailwood and Engleman.

20 It's also not in dispute that there are two
21 properties that the Savoy Defendants are currently
22 selling on land contract. That's Jimmy and Duncan, and
23 that there are two properties, Irene and Teppert, that
24 the Savoy Defendants still own and have not sold, both
25 of which are currently being rented.

1 After the four properties were sold, Antonia,
2 Raymond, Fox Crest and Lowell, the relationship between
3 the parties broke down, and there was conflicting
4 testimony as to why, but there's certainly no dispute
5 that after those properties were sold, the Savoy
6 Defendants fired Mr. Roberts and ceased to do further
7 business with him.

8 Realty believes that it has demonstrated the
9 following disputed facts that it believes it has
10 demonstrated, and it should not be found to be in
11 dispute, which is that, first, when Mr. Roberts
12 developed this investor program in 2009, he testified
13 at the May 19, 2009, but I think it's pretty clear it
14 was somewhere around May or June 2009, his idea was
15 that investors were going to buy these properties, and
16 they would want to either put minimal, or perhaps a lot
17 of maintenance or repair work into the properties, and
18 immediately flip them, and what turned out to happen,
19 and this was testified by Mr. Confer and Mr. Roberts,
20 was that a number of investors, Mr. Confer first among
21 them, didn't want to flip the properties. They
22 preferred to hold onto them and reap the stream of
23 income from rental payments which, under the terms of
24 the investor program, they did not have to share with
25 Ralph Roberts Realty.

1 So as a result of this, Mr. Roberts
2 testified, and Mr. Confer testified, as well, that
3 there became sort of two pieces to the investor
4 program, the rental piece and the flip piece, wherein
5 if you were an investor and you purchased a property
6 and you flipped it, you were entitled to credit off
7 pretty much all of the expenses that you incurred in
8 connection with that property, against the split that
9 you had to pay to Ralph Roberts Realty, and this was
10 because you didn't -- you weren't streaming any income
11 from it. You -- The only income stream you were going
12 to get was the profit you got when you sold it, but if
13 an investor, on the other hand, decided they wanted to
14 rent the property, they did get to keep all of the
15 rental income, but as a consequence of that, then they
16 couldn't deduct all the expenses because those expenses
17 should have been and, as far as Realty knows, all cases
18 other than the Savoy Defendants, were covered by the
19 stream of income that was coming from the rentals --
20 the rental payments on those properties, and Mr. Confer
21 testified to that, that he has not flipped a single
22 property, but that what he does, he will owe Ralph
23 Roberts Realty a 50 percent split, but he will not be
24 entitled to credit off any of the expenses with respect
25 to any of his properties.

1 Mr. Roberts testified at trial, that he
2 explained the terms of these programs, or his investor
3 program, Part A and Part B, to all of his investors,
4 although Mr. Savoy denied that he had ever had anything
5 like that explained to him, but Mr. Confer also
6 testified that he understood that that would -- that
7 was the term -- those were the terms of the program if
8 you rented your properties verses if you just
9 immediately flipped them.

10 Mr. Roberts then went on to testify that his
11 program does envision a proportional share of losses.
12 If an investor does lose principal in this program, Mr.
13 Roberts testified that Realty would share
14 proportionately in that loss. So if the investor, on
15 the upside, had agreed to a 50 percent split of the
16 profit -- net profit with Ralph Roberts Realty, if for
17 some reason the investor lost principal, the investor
18 would be entitled to split 50 percent of that loss. It
19 wasn't a, all losses got credited, it was a
20 proportional share of the loss.

21 But Mr. Roberts also testified that this only
22 came into being -- this sort of proportional loss share
23 only came into being recently, as a response to certain
24 other investors, not the Savoy Defendants' inquiries at
25 his -- either his Wednesday night investor meetings or

1 as a result of meetings with these investors, but as of
2 the date of the trial, as of the date of Mr. Roberts'
3 testimony, he had not -- none of his investors, other
4 than the Savoy Defendants, had ever reported any losses
5 in connection with properties that they purchased at
6 this investor program.

7 So the Savoy Defendants are the only ones who
8 have ever said that there was a loss, and they have
9 said that there were losses with respect to, I think,
10 three out of the -- either two or three out of the
11 properties that were sold, where no money was paid to
12 Ralph Roberts Realty.

13 Mr. Roberts further testified that there was
14 no loss share with respect to the Savoy Defendants
15 because they had such a better deal with Ralph Roberts
16 Realty than any of the other investors in his program,
17 and Mr. Savoy vigorously disputed this, but Mr. Roberts
18 did testify that no other investor's ever gotten as low
19 -- he's never gotten as low of a split as 30 percent
20 from any other investor. He's never had to pay any
21 other investor a seller's fee, in other words, a \$5,000
22 fee that's sort of equal to the acquisition fee that he
23 gets, and he's never let any other investor pay the
24 acquisition fee in installments. So he testified that
25 he did not have a loss share with the Savoy Defendants

1 because they were already getting such a good deal.

2 He further testified that he never considered
3 the idea of a loss share because he doesn't think that
4 anybody can lose money in his program, and Mr. Confer
5 testified to that, as well.

6 Mr. Savoy testified and Mr. Roberts --

7 THE COURT: So you, of course, saw the
8 argument in the post-trial brief filed by Defendant,
9 attacking Ralph Roberts' credibility and arguing that
10 he testified consistently on this issue of whether the
11 program included a loss -- the splitting of losses?

12 MS. MCCOLLUM: Yes.

13 THE COURT: I think the -- it was pointing,
14 in part, to the affidavit of Mr. Roberts that was
15 filed in this case, in the summary judgment
16 proceedings. I think it was Defendants' Exhibit S.

17 Now, that exhibit itself was not admitted
18 into evidence, that affidavit of Mr. Roberts, but there
19 was testimony, and it -- it was brought out during
20 testimony and cross-examination of Mr. Roberts, about
21 his -- things he -- some things he said in that
22 affidavit, including paragraph 23, the investor program
23 does not contain any provision for the splitting of
24 losses on properties.

25 Now, isn't that sworn testimony and that

1 affidavit by Ralph Roberts, inconsistent with his
2 testimony at trial on this point?

3 MS. MCCOLLUM: Your Honor, Ralph Roberts
4 Realty believes that it's not inconsistent, that he
5 testified at the Roger Roberts trial, that there was a
6 loss share. He testified at this trial, I think -- If
7 you give me a second I'll find it in the trial
8 transcript.

9 (Pause.)

10 MS. MCCOLLUM: He testified -- He -- We
11 started to testify on direct, on page 28 of the trial
12 transcript, starting at about line 13, when I asked him
13 if he had ever testified about investor losses, and he
14 explained that yes, he had. He had testified in the
15 Roger Roberts case, and that he said that there was a
16 loss share.

17 And then if you continue onto the next page,
18 I asked him if he signed an affidavit in this adversary
19 proceeding, and he said "Yes," and I said, "Well, what
20 did it say?", and he testified that yes, he did sign a
21 sworn statement that there were no losses in -- there
22 was no loss share in connection with the Ralph Roberts
23 Realty investor program, but that when he signed --
24 first, when he testified in the Roger Roberts case, he
25 was certainly focused on his agreement with Roger

1 Roberts, and when he wrote this -- when he swore to
2 this affidavit, he was certainly focused on his
3 dealings with the Savoy Defendants, but that he does
4 not believe those two positions are inconsistent.

5 The Roger Roberts investor relationship was
6 developed much later than that with the Savoy
7 Defendants, and there, at that point, was a loss share,
8 whereas with the Savoy Defendants, the investor program
9 did not include a loss share. So he does not think
10 that those two -- essentially three sworn statements
11 are inconsistent at all.

12 THE COURT: Where did he testify to that,
13 that he doesn't believe they're inconsistent, and what
14 he was focusing on, and so forth? I don't see any of
15 that in the pages --

16 MS. MCCOLLUM: In the --

17 THE COURT: -- two pages you've cited in the
18 transcript, 28 and 29.

19 MS. MCCOLLUM: He testified -- I'm sorry, he
20 testified here, 28 and 29, about the two affidavits,
21 and then he had testified that there was a loss share
22 in the Roger Roberts case, and then he comes down here
23 and he says, on line 17 at page 29, that there were no
24 -- that he didn't talk about any losses.

25 Then Mr. Kwiatkowski cross-examined him, and

1 I'm going to need to find that, and I believe that on
2 cross-examination is when he clarified that when he
3 talked about the -- when he was talking about loss
4 share and Roger Roberts, he was discussing that
5 particular investor relationship, and if you give me a
6 second --

7 THE COURT: I'm focusing not so much right
8 now, on the Roger Roberts trial testimony of Mr. Ralph
9 Roberts, but rather on paragraph 23 of the affidavit,
10 Defendants' Exhibit S, which was filed in this case,
11 and which had -- on October 7th, and the affidavit was
12 dated October 7th, 2013.

13 Paragraph 23:

14 "The investment program does not contain any
15 provision for the splitting of losses on
16 properties."

17 That statement.

18 MS. MCCOLLUM: Correct.

19 THE COURT: So what about the statement?

20 MS. MCCOLLUM: Mr. --

21 THE COURT: Isn't that inconsistent with his
22 testimony, both in the Roger Roberts trial and in this
23 trial?

24 MS. MCCOLLUM: No, he does not believe it is
25 because he believes that when he was -- when he signed

1 that affidavit, it was directed towards the Savoy
2 Defendants' participation in the investor program, and
3 that at the time that he entered into the investor
4 program terms with the Savoy Defendants, there was no
5 loss share.

6 THE COURT: Did he say that in his testimony
7 at trial, that that's his belief?

8 MS. MCCOLLUM: I believe that he did on
9 cross, and if you give me your -- a minute, Your Honor,
10 I can try to find that.

11 THE COURT: Go ahead.

12 (Pause.)

13 MS. MCCOLLUM: Yes, page 95 of the trial
14 transcript, starting on line 19, the first
15 (unintelligible) in Exhibit S.

16 THE COURT: Hold on one second.

17 (Pause.)

18 THE COURT: Okay. I see that place at page
19 95. Go ahead.

20 MS. MCCOLLUM: And Mr. Roberts testifies --
21 Mr. Kwiatkowski asks him, essentially line -- reads him
22 line 23, and Mr. Roberts says, "Yes."

23 And in response to the question of, "How is
24 that consistent?", and Mr. Roberts says, "It's truthful
25 with Jon and Butch (phonetic). That's the agreement we

1 had."

2 And Mr. Kwiatkowski says, "But that's not
3 what this says", and Ralph says "Yes, that's what that
4 -- this says, the investor program.

5 All right.

6 "When I did this affidavit, it was for this
7 case. I never had a splitting of losses
8 arrangement with Jon and Butch. I currently
9 now, in my program, believe that if there's a
10 loss, I'm responsible for 50 percent. If
11 there's a gain, I get 50 percent, but that
12 did not exist when the program was started."

13 THE COURT: That transcript -- That's pages
14 95 and over to 96 in the trial transcript?

15 MS. MCCOLLUM: Correct.

16 THE COURT: Yeah. Okay. Go ahead.

17 MS. MCCOLLUM: And again, in connection with
18 this investor program, when the Savoy Defendants joined
19 Realty's investor program, they were essentially, other
20 than Ray Confer, the only investors. So at that time
21 it was even more of a handshake agreement than it was
22 before the bankruptcy case was filed, and that's why
23 we're here, because none of the terms were written
24 down, and obviously the parties vehemently disagree as
25 to the terms of the program, but I would point out that

1 Mr. Roberts has been consistent in saying that if there
2 is a loss share, as has been basically, he said, later
3 developed, that loss share is proportional.

4 So the Savoy Defendants have taken the
5 position that if they have a loss on a property,
6 they're entitled to set off or credit that entire loss,
7 and Mr. Roberts and Mr. Confer both said, "No, that's
8 not the case, it would be proportional," but in any
9 event, the only investors who have ever claimed that
10 there was a loss, were the Savoy Defendants. Nobody
11 else, out of the thousand properties that have been
12 purchased through this program, have never said that
13 they had any kind of a loss with respect to a property,
14 and that was testified to by Mr. Roberts --

15 THE COURT: Where does the -- in the trial
16 transcript did Mr. Roberts testify and Mr.
17 (Unintelligible) testify that if there is a loss
18 sharing, it's proportional? Do you have that citation
19 handy?

20 MS. MCCOLLUM: Your Honor, I'm going to have
21 to find it. So if you give me a minute I --

22 THE COURT: Is that in your proposed
23 findings? I don't -- I'm sure it is.

24 (Pause.)

25 THE COURT: It's in your Proposed Findings of

1 Fact Number 38, page 5, it states that proposition and
2 it cites to the trial transcript, at page 28.

3 MS. MCCOLLUM: Uh-huh, lines 20 to 22.

4 THE COURT: Yeah.

5 MS. MCCOLLUM: And it does kind of continue
6 from there. He explains a little bit more, but
7 essentially, yes, it's a proportional loss share, just
8 like it's a proportional gain share.

9 THE COURT: All right. I see. He says, at
10 page 28, lines 20 to 22, "Realty would share the down
11 side according to the percentage," that that's the idea
12 there, right?

13 MS. MCCOLLUM: Yes.

14 THE COURT: All right. Thanks. Go ahead.

15 Oh, what about Confer? Did he -- Is -- Where
16 did he testify to that? Do you have that? I don't
17 think you cited to Confer's testimony.

18 MS. MCCOLLUM: I didn't, and I may be
19 mistaken, Mr. Confer may not have testified to that.
20 Let me --

21 THE COURT: Do you know that he --

22 MS. MCCOLLUM: I thought he did, but until I
23 find it in the transcript, I will not be able to tell
24 you.

25 THE COURT: You don't have it handy?

1 MS. MCCOLLUM: I don't.

2 THE COURT: All right. Go -- Why don't you
3 go ahead.

4 MS. MCCOLLUM: Okay.

5 And, Your Honor, I can look at that and bring
6 it up on reply.

7 THE COURT: Well, I can look at it too. We
8 have a transcript of Mr. Confer's testimony, and I have
9 my notes of his testimony too. So, go ahead.

10 MS. MCCOLLUM: And in -- going back to the
11 sort of fluid nature and the reason that we're here is
12 that nobody wrote down the terms of the investor
13 program between the Savoy Defendants and Ralph Roberts
14 Realty, so Ralph Roberts Realty says there's no loss
15 share with the Savoy Defendants, there's no setoff,
16 there's no right of first refusal, and the Savoy
17 Defendants, of course, vigorously dispute all of that
18 and claim that all of those things were part of the
19 terms.

20 Mr. Roberts and Mr. Confer did both testify
21 that there's no right of first refusal for any
22 particular investor. The Savoy Defendants may have had
23 sort of a defacto right of first refusal at the
24 beginning, as they were basically the only investors,
25 but the way the program works, and Mr. Roberts and Mr.

1 Confer both testified, is Ralph Roberts Realty sends
2 out an e-mail. The first investor to respond to the e-
3 mail is first on a property. There's usually a couple
4 behind them, so if the first drops out for any reason,
5 there's an alternate investor. Mr. Roberts, I believe,
6 testified that sometimes the investors talk amongst
7 themselves about which -- you know, if a particular
8 investor really wants a house they may cede to another
9 investor at that point, and sort of trade houses
10 around, but there's no right of first refusal for any
11 particular investor.

12 Mr. Roberts testified that each house was a
13 separate contract, that there was no sort of aggregate
14 investor contract for all houses that an investor
15 purchased and --

16 THE COURT: Well, that's really a legal
17 conclusion, isn't it?

18 MS. MCCOLLUM: That is a legal conclusion,
19 Your Honor, and I --

20 THE COURT: That he's not qualified to opine
21 about.

22 MS. MCCOLLUM: No. He can say that in his
23 mind he thought they were different contracts, but he
24 can't --

25 THE COURT: Tell what his intention was,

1 perhaps, as a contracted party.

2 MS. MCCOLLUM: Correct. He can say -- He --
3 And I -- And he did say that he treated them all sort
4 of, in his mind, as separate contracts. He is
5 certainly going --

6 THE COURT: Should these be viewed as --
7 legally as something sort of akin to an installment
8 contract, where you have, just as example, for a sale
9 of goods, you have a blanket order which says, "Here
10 are the terms on which I'm going to order goods from
11 you, my supplier, that you're going to make and ship to
12 me in installments" as I -- "according to specific"
13 releases -- "purchase order or releases" --

14 MS. MCCOLLUM: Right.

15 THE COURT: -- "under this blanket order?"
16 The blanket order has the terms of our agreement that
17 all these future orders will be subject to price,
18 delivery, payment terms, and all of those sorts of
19 things, warranties, everything, and then orders are
20 made under that later.

21 And so there's several instalments in which
22 goods are ordered, shipped, paid for, or to be paid for
23 under that sort of master contract.

24 Isn't this like that, or analogous to that,
25 so that at least arguably, this is like an installment

1 contract, but it is a single contract, but rather than
2 suggest that these are just each separate proceeding
3 contracts.

4 MS. MCCOLLUM: Your Honor, I think Mr.
5 Roberts views it more as if you're going to analogize
6 it to sort of a customer and supplier relationship,
7 that -- more of a relationship between two parties,
8 sort of an ongoing business relationship, but not a
9 blanket supply contract because those are very specific
10 and very detailed things.

11 At this point Mr. Roberts -- Every time an
12 investor buys a house, they sign a separate piece of
13 paper that says, "We bought a house. We owe you 50
14 percent." They're -- Overall, they're members of the
15 investor program and --

16 THE COURT: They sign a separate piece of
17 paper?

18 MS. MCCOLLUM: Yes.

19 THE COURT: What do you mean?

20 MS. MCCOLLUM: Once Ralph Roberts --

21 THE COURT: Let's talk about this case and --

22 MS. MCCOLLUM: Correct.

23 THE COURT: -- these parties.

24 Where did they sign any piece of paper?

25 MS. MCCOLLUM: I'm sorry, Your Honor. These

1 parties didn't sign anything.

2 THE COURT: Yeah. Okay.

3 MS. MCCOLLUM: Course of dealing going
4 forward, Mr. Roberts requires all those investors to
5 sign something every time they buy a house.

6 When these parties did their arrangement,
7 they bought -- The Savoy Defendants bought 16
8 properties through Ralph Roberts Realty's investor
9 program. They didn't sign anything.

10 THE COURT: So that this -- whatever he has
11 people sign now, that wasn't part of the agreement
12 between these parties?

13 MS. MCCOLLUM: That's correct.

14 THE COURT: Yeah. Okay. There was no
15 testimony that they signed anything, --

16 MS. MCCOLLUM: Nope. That's absolutely
17 correct.

18 THE COURT: -- or were to sign anything.

19 MS. MCCOLLUM: There was absolutely no
20 written agreement here, and that's the problem. That's
21 what's led to this lawsuit.

22 I can just say that Mr. Roberts does not
23 treat it like an installment contract, like a master
24 contract with separate releases for different things.
25 Mr. Roberts treats it as an investor relationship, but

1 if an investor wants to purchase a property, they
2 purchased a property, and he treats that, in his head,
3 like a separate transaction, but I suspect that the
4 Savoy Defendants do not view it that way. They view it
5 more like Your Honor views it, as sort of an
6 installment contract, where they just kind of --

7 THE COURT: Well, I didn't say --

8 MS. MCCOLLUM: -- buy properties.

9 THE COURT: -- how I viewed it. I'm asking a
10 question, "Is it like that?"

11 Of course, if -- to the extent the Court
12 finds that there were terms of the program, the
13 investor program that these parties agreed to, that
14 linked the different transactions, for example, the
15 Defendants' argument that part of the deal that they
16 had with Ralph Roberts was that losses -- if they
17 suffered losses, those could be credited against
18 profits for some other properties that were -- where
19 there was a profit, that's another example where
20 legally the contracts don't look so separate and -- the
21 individual property transactions don't look so
22 separate, they look like separate pieces of the same
23 contract, don't they?

24 MS. MCCOLLUM: Your Honor, I can't agree with
25 you because that's not how my client views it, but I

1 can say that if that is the legal conclusion that is
2 going to be drawn, that there are several problems with
3 it, I think, because the Savoy Defendants are, I think,
4 six separate individuals and entities, and so for that
5 to work, the investor program, the sort of master
6 contract would have to be between Realty and all of
7 these entities, some of which were not in existence at
8 the time that the properties were purchased. They were
9 formed by the Savoy Defendants later, and the
10 properties were transferred into those entities.

11 So I think that that may be a factual barrier
12 to finding this sort of master contract --

13 THE COURT: Well, you're seeking judgment in
14 this case, jointly and severally against all these
15 Defendants, --

16 MS. MCCOLLUM: Yes.

17 THE COURT: -- the Savoy Defendants, for
18 everything?

19 MS. MCCOLLUM: Yes.

20 THE COURT: Right?

21 MS. MCCOLLUM: Yes.

22 THE COURT: So why -- How does that square
23 with your point that you just made, that there's six
24 separate entities? I mean, I -- lately (phonetic) --
25 Of course they're separate entities, but I thought

1 Plaintiff's theory was they're all entered jointly into
2 this program with (unintelligible).

3 MS. MCCOLLUM: Realty's position is that Mr.
4 Savoy and Mr. Hassig themselves entered into this
5 relationship with Ralph Roberts Realty, and that the
6 way that most investors treat the program is they
7 individually purchased the properties, and this is the
8 case with most of the properties here, they were
9 purchased -- the individual deeds -- Sheriff's Deeds
10 were purchased by Mr. Savoy, and then generally the
11 investors transferred those properties into LLCs,
12 mostly for protection, so that if something happens
13 during the redemption period, or beyond, on the
14 property, the investor is shielded from personal
15 liability. Somebody trips and falls on the stairs in
16 an abandoned property, the LLC can be liable for it but
17 the individual investor wouldn't be.

18 So if you look at the purchase records and
19 the deed transfer records in this case, it's clear that
20 most of the properties were purchased by Mr. Savoy
21 individually, and then transferred to various LLCs, and
22 Mr. Savoy is back there disputing this vigorously, but
23 I think you can look at the exhibits that we have
24 presented, and you can look at the time line, and that
25 is what happened, although I do know that some of the

1 properties were purchased, and it's certainly in my
2 (unintelligible) findings of fact, were purchased by
3 the LLCs themselves, but to find that they were sort of
4 all blanket participants is a little difficult because
5 some of them weren't in existence when the first
6 properties were bought, just from the timing
7 perspective.

8 THE COURT: Well, so those -- an entity that
9 wasn't in existence when the first property was bought,
10 how are they liable for any profit split on that --
11 such a property?

12 MS. MCCOLLUM: If it wasn't in existence it
13 could be --

14 THE COURT: In other words, I -- The larger
15 question is, how is it that all of these Defendants
16 which you've named in the case, are jointly and
17 severally liable for everything that you're claiming,
18 rather than Plaintiff -- the Court having to look at
19 them separately?

20 MS. MCCOLLUM: It's Plaintiff's position
21 that, like I said, Mr. Savoy purchased the majority of
22 the properties in his own name, and that they were then
23 transferred to the LLCs. To the extent that the LLCs
24 then disposed of the properties and Mr. Savoy received
25 no consideration, essentially, for the transfer, then I

1 suspect that our theory is something of a fraudulent
2 transfer theory, that when Mr. Savoy bought the
3 properties and then transferred them to the LLC, the
4 LLC is, in essence, liable to him, and he is liable to
5 Ralph Roberts Realty for the profits (unintelligible)
6 that he did not pay.

7 THE COURT: Do we have to go property by
8 property and figure out which of the Defendants --
9 assuming I agree with the Plaintiff's case, in general,
10 which I haven't decided I do yet, in this very disputed
11 matter, but assuming I do, does the Court have to go
12 individually, property by property, and figure out
13 which Defendants are liable for which property
14 transactions?

15 MS. MCCOLLUM: It may be. The -- My findings
16 of fact --

17 THE COURT: Is that -- Is there any sort of
18 analysis like that yet, in your briefing?

19 MS. MCCOLLUM: Yes. Each of the properties
20 is discussed in my proposed findings of fact, and it is
21 -- for example, if you look at page 11 of my proposed
22 findings of fact, Number 86, it says:

23 "Defendant Jon Savoy purchased the Ledgestone
24 property."

25 So at this --

1 THE COURT: Wait a minute. Hold on.

2 Paragraph 86, I see paragraph 86:

3 "Jon Savoy purchased Ledgestone."

4 Yes?

5 MS. MCCOLLUM: If you then go to page 12,
6 paragraph 95, the Firwood property Defendant Ryan
7 Residential Properties Group, LLC, purchased it --
8 purchased Firwood and then sold it.

9 Trailwood, paragraph 102 --

10 THE COURT: So are you saying as each of
11 these properties, the proposed findings, backed up by
12 citations to the evidence, say which Defendant
13 purchased which property?

14 MS. MCCOLLUM: Yes.

15 THE COURT: Now, let's take an example. Now,
16 hold on a minute.

17 (Pause.)

18 THE COURT: Well, I'll tell you -- Let's take
19 Ledgestone as an example, okay, which you discuss on
20 page 11 and 12 of your proposed findings of fact and
21 conclusions of law, Docket Number 62.

22 Jon Savoy purchased the property, apparently,
23 you're saying, in paragraph 86.

24 Then you talk about various charges, and so
25 forth.

1 You end up, at paragraph 94, saying:

2 "The profit split owed to Plaintiff on

3 LedgeStone is \$9,583.80."

4 Now, who owes that profit split, Jon Savoy,
5 Jon Savoy and others? So which others? All of the
6 Defendants? And if it's more than just Jon Savoy, why?

7 (Pause.)

8 MS. MCCOLLUM: Your Honor, I'm going to have
9 to revise these because that doesn't match the
10 Sheriff's Deed that I cite to.

11 THE COURT: What does the Sheriff's Deed
12 indicate? That's what --

13 MS. MCCOLLUM: The Sheriff's Deed indicates
14 that the property is purchased by Ryan Residential
15 Properties Group, LLC, and that the warranty deed
16 transferring it to the eventual third-party purchaser,
17 although it was drafted by Jon Savoy, it was drafted by
18 him as managing member of Ryan Residential Properties
19 Group.

20 THE COURT: Which is one of the Defendants?

21 MS. MCCOLLUM: Correct.

22 THE COURT: So at least with that one you're
23 now saying Ryan Residential Properties Group, LLC is
24 liable for the profit split --

25 MS. MCCOLLUM: Yes.

1 THE COURT: -- that's referred to in
2 paragraph 94?

3 MS. MCCOLLUM: Yes.

4 THE COURT: So are any other Defendants
5 liable for that, as well, to the Plaintiff, or is it
6 just that Defendant?

7 MS. MCCOLLUM: Your Honor, to the extent that
8 Jon Savoy is the managing member, and that there is any
9 reason to hold him personally liable for this, for
10 example, if the LLC was dissolved while litigation was
11 pending and, you know, distributions were made to
12 members, then yes, Mr. Savoy, as a member, may be
13 liable, and I think is liable, for distributions
14 received when Mr. Roberts wasn't paid -- I'm sorry,
15 when Ralph Roberts Realty wasn't paid.

16 THE COURT: Well, there wasn't any evidence
17 about any of that at this trial, was there?

18 MS. MCCOLLUM: No.

19 THE COURT: So there's no evidence to suggest
20 that -- even that this LLC, Ryan Residential Property
21 Group, LLC, has even been dissolved?

22 MS. MCCOLLUM: No, and, Your Honor, standing
23 here today, I don't know whether it's been dissolved or
24 not. I do know that there were some -- there was some
25 references in Mr. Kwiatkowski's briefs, to the fact

1 that some of these entities have been dissolved or, in
2 the alternative, have no assets such that a judgment
3 against them would essentially be futile, but standing
4 here --

5 THE COURT: Where did he say that?

6 MS. MCCOLLUM: I'm sorry, Your Honor, may I
7 speak with Mr. --

8 THE COURT: Don't -- He can talk later. I'm
9 asking you though. If he said that, where did he say
10 that and what did he say; do you know?

11 MS. MCCOLLUM: I don't know.

12 THE COURT: Okay. All right. So, you said
13 you're going to have to revise these.

14 Are you saying you want an opportunity now,
15 to revise your proposed findings of fact to make
16 corrections, at least with respect to Ledgestone, and
17 you don't know whether others need it?

18 MS. MCCOLLUM: Your Honor, I don't think any
19 others need it. That's a -- That's very sloppy on my
20 part and I apologize, because the Sheriff's Deed does
21 clearly say that it was Ryan Residential Properties
22 Group.

23 THE COURT: Well, are there errors like that
24 with any of the other properties; do you know?

25 MS. MCCOLLUM: I don't know, but I don't

1 think so.

2 THE COURT: Well, so getting back to the -- a
3 question I asked you a minute ago on Ledgestone, this
4 profit split that you're referring to in paragraph 94,
5 that you say is owed -- this amount that's owed to the
6 Plaintiff on Ledgestone, as an example, that -- you're
7 saying but for some possible argument that there's no
8 evidence regarding an improper dissolution of that
9 entity, and distributions of assets that's -- doesn't
10 comply with law, and which there's no evidence in the
11 trial that there's no basis for holding any of the
12 other Defendants, other than that LLC, Ryan Residential
13 Property Group, LLC, liable?

14 MS. MCCOLLUM: Not unless Your Honor finds,
15 as you were just saying, that all of the Defendants
16 participated under sort of a master supply agreement,
17 and then individual properties were purchased, sort of
18 even allogized (phonetic) it to a release under that
19 contract or a purchase order, or that kind of a change
20 order, if that's the view of the program, that has
21 advantages to us, in that we made -- that hold
22 everybody liable, but it has disadvantages in that if
23 that's the view of the agreement, then setoffs are
24 certainly more easily permitted under that kind of
25 arrangement, than they would be if each of the

1 Defendants was separately liable for the property that
2 it purchased as a separate contract.

3 THE COURT: Well, what is the Plaintiff's
4 view of which Defendants are liable for which
5 properties and why?

6 MS. MCCOLLUM: I can tell you that the view
7 of Mr. Roberts is that Mr. Savoy and Mr. Hassig are
8 personally liable for all of this, and that the LLCs
9 are essentially -- and this is his opinion, not a legal
10 conclusion. I will just -- I will preface that. And
11 that his opinion is that the LLCs essentially don't
12 mean very much. They're a shielding for tax reasons or
13 for liability reasons. I realize that that is not a
14 legal conclusion, and so legally I would have to say
15 that if that's the view, you'd have to trace the
16 Sheriff's Deeds, and if, for example, Ryan Residential
17 Property Group purchased Ledgestone and sold it, then
18 Ryan Residential Property Group would be the
19 participant in the investor program, and would be the
20 one that would be liable to Ralph Roberts Realty for
21 unpaid splits.

22 THE COURT: So the Plaintiff's view, excuse
23 me, Ralph Roberts' view, when you say that, you mean
24 the Plaintiff's view, --

25 MS. MCCOLLUM: Right.

1 THE COURT: -- right? The Plaintiff's
2 contention and view is -- and view of the evidence is
3 that there is an evidentiary basis to hold Mr. Savoy
4 and Mr. Hassig personally liable, in addition to one of
5 our other Kennedy (phonetic) Defendants who are
6 involved in each property transaction, but you hold
7 those two individuals liable on all of them because
8 they agreed to that as part of their investor program
9 with the Plaintiff; is that it?

10 MS. MCCOLLUM: Yes.

11 THE COURT: So that was one of the terms of
12 the -- features of this investor program with --
13 between these parties?

14 MS. MCCOLLUM: Correct. They put in the
15 money. They were the ones liable for the upside, the
16 30 percent split of the upside.

17 THE COURT: Was there any testimony by anyone
18 specifically addressing this question of whether the
19 parties agreed that these two individuals would be
20 liable, even if they created entities?

21 MS. MCCOLLUM: No. There was no testimony
22 from any of the three witnesses.

23 THE COURT: And when you say these LLCs were
24 created, you said, "for tax reasons or to shield from
25 liability," you, of course -- I think, or you gave an

1 example earlier, of shielding the individuals from
2 liability to third parties for slip and fall on the
3 property, and that sort of thing, not as a shield of --
4 from liability to the Plaintiff?

5 MS. MCCOLLUM: No, that's correct, and I
6 think Mr. Roberts testified to this because there was a
7 question in this case, as to the nail -- what was Nail
8 Construction, and he did testify in the transcript,
9 that that was an entity that Ralph Roberts Realty
10 occasionally used to transfer these deeds into during
11 redemption period, to shield the investors, again, from
12 third-party -- or from liability to third parties, for
13 incidents of third parties that happened on the
14 premises during redemption. That was, in Mr. Roberts'
15 view, a fairly common practice.

16 So no, there's no allegation from Plaintiff,
17 that what the Savoy Defendants did in forming these
18 LLCs, or in purchasing properties in the LLCs was in
19 any way intended to shield the properties or the
20 upside, from Ralph Roberts Realty.

21 THE COURT: Okay. Go ahead.

22 MS. MCCOLLUM: One of the major issues in
23 this case, and it's both, I think, the legal issue and
24 a factual issue, is whether there are rights of setoff
25 here.

1 So first, in order to have a setoff, you have
2 to have a loss, and Mr. Roberts testified that he
3 doesn't believe Defendants lost money in all these
4 properties. Defendants have vigorously disputed this.
5 So in -- If this Court finds that there were no losses
6 on these properties that were sold, for which no split
7 was paid, then the -- then there is no setoff question,
8 because it there's no losses, there's nothing to set
9 off.

10 If this Court does find that there were
11 losses, and there was testimony from Mr. Roberts about
12 the terms of the program and how rentals worked, and
13 there was testimony from Mr. Savoy that he didn't
14 believe that that was how it worked at all, and he was
15 entitled to credit, all of these things, if this Court
16 finds that there were losses, then the question is,
17 "What were the terms of the investor program, and did
18 they permit setoff?", and Mr. Roberts testified that in
19 his mind the investor program does not permit the
20 setoff of losses, but then he testified that if an
21 investor loses principal post his agreement with Savoy
22 Defendants, then that investor would be entitled to
23 credit those losses against future profits.

24 So, Mr. Roberts is, in essence, testifying
25 that when he entered into his relationship with the

1 Savoy Defendants, he didn't think there were losses, he
2 didn't think losses were possible, and so setoff, in
3 his mind, wasn't even an issue because he didn't think
4 that there was going to be any reason for a setoff.

5 He then testified that certainly in the future
6 -- certainly after this Savoy Defendants' participation
7 in this program, that other investors did raise that as
8 an issue, and he does envision a sharing of losses.

9 So, in essence, the issue for this Court to
10 decide, is whether Mr. Roberts credibly testified that
11 he just did not think there was a setoff, or any kind
12 of loss sharing with respect to the Savoy Defendants,
13 and this goes back to Your Honor's point about whether
14 his testimony was consistent, between his trial
15 testimony and his affidavit in this case, and he -- and
16 as I stand here, I say yes, it was, and the Savoy
17 Defendants say no, it is not, that it's wildly
18 contradictory, and we don't think it is.

19 We think he, as I said, envisioned a program
20 with the Defendants. It was all oral and it was
21 certainly a handshake agreement, and that he did not
22 think that there was any reason that they would ever
23 have a loss, and so he did not envision a loss share,
24 and he certainly didn't envision that if there was a
25 loss, they could then set it off against future

1 profits.

2 And I don't know -- Part of the issue, like I
3 said, with a setoff, is that that is a very legal
4 issue, as well. If Your Honor finds that there were
5 losses, and regardless of the parties' intent, because
6 the parties can't agree to the intent, that there were
7 losses, then the question is, "Can the Savoy Defendants
8 legally setoff in the circumstances of this case?", and
9 that's sort of jumping ahead to my proposed conclusions
10 of law.

11 Both Mr. Roberts and Mr. Savoy testified that
12 none of the Savoy Defendants ever filed a proof of
13 claim in this case, and Mr. Kwiatkowski and I certainly
14 have extensively briefed the legal issue as to whether
15 if a party does not file a proof of claim, they may
16 still assert setoff as a defense. Our position is that
17 there is case law that says "No," and Mr. Kwiatkowski
18 and the Savoy Defendants say there's case law that says
19 "Yes."

20 THE COURT: Why do you even call this a
21 "setoff," as opposed to a recoupment defense, by the
22 way?

23 MS. MCCOLLUM: Because again, if Your Honor
24 agrees with Mr. Roberts and the Plaintiff's view of the
25 program, that sort of each property was separate, then

1 it really is a setoff issue.

2 If Your Honor believes that it was sort of a
3 conglomerate, basically, that all the Defendants
4 purchased all the properties, and it was one big
5 agreement, then it is a recruitment issue, but it
6 depends on the view of how the properties are purchased
7 and how the investors were participating in the
8 program.

9 THE COURT: Does the Plaintiff agree or
10 concede that to the extent the Court finds that there's
11 recoupment defense as opposed to a setoff claim, which
12 seems, under the case law, to turn on whether they were
13 separate transactions or not, but if the Court finds --
14 to the extent the Court finds it's a recoupment setoff,
15 do you agree that the Defendants are entitled to raise
16 it as a defense, that their raising it as a defense is
17 not barred by either their failure to timely file a
18 proof of claim in the Chapter 11 bankruptcy case of
19 Plaintiff, or by the confirmed plan?

20 MS. MCCOLLUM: No, we don't agree.

21 THE COURT: You don't? Okay.

22 MS. MCCOLLUM: No.

23 THE COURT: So even if it's a recoupment
24 defense, it's barred why?

25 MS. MCCOLLUM: Because the terms of the plan

1 are pretty clear that any and all claims that any and
2 all claimants had against Ralph Roberts Realty, are
3 forever barred after the terms of -- after the time for
4 -- sorry, after entry of the confirmation order.

5 So the extent that --

6 THE COURT: You think that can be viewed as
7 broad enough to strip away any recoupment defense that
8 any Defendant might have against any claim that
9 Plaintiff might pursue in the future, --

10 MS. MCCOLLUM: Yes.

11 THE COURT: -- long as the claim arose before
12 confirmation?

13 MS. MCCOLLUM: Yes. Realty certainly
14 intended it that way when the -- when we drafted the
15 plan. Now, Your Honor may not agree, but that
16 certainly is what we intended.

17 THE COURT: All right.

18 Of course, the parties, I recall, did brief
19 these legal issues, and the summary judgment motion
20 proceedings, I think you also discuss it in the post-
21 trial briefs, --

22 THE COURT: -- as well, but I'll consider
23 both. I didn't make any specific substantive ruling,
24 in ruling on the summary judgment motions, on these
25 legal issues or arguments.

1 So, okay. Go ahead.

2 MS. MCCOLLUM: Another issue that was
3 briefly touched on at trial and addressed in the
4 briefs, was the acquisition fees. It's Plaintiff's
5 view that the Savoy Defendants owe \$16,000, little over
6 -- almost \$17,000 in acquisition fees. We presented
7 evidence of our accounting for these fees and the
8 credits that Ralph Roberts Realty gave the Savoy
9 Defendants for amounts that were paid, and it's our
10 belief that the Savoy Defendants have not presented any
11 evidence to refute our accounting on this.

12 The next pieces here, essentially, are that
13 in the post-trial briefs, Plaintiff alleged the amounts
14 it believes is owing from the Defendants on each of the
15 four properties that were sold by the Savoy Defendants,
16 and for which a split was not paid.

17 The first three, Ledgestone, Firwood and
18 Trailwood, of those three, Ledgestone and Trailwood
19 were unquestionably profitable, even accounting for the
20 differences, in Plaintiff's view, of the profit, and
21 Defendants' view of the profit.

22 There was certainly testimony that the
23 agreement was a \$5,000 sellers fee, and that the Savoy
24 Defendants unilaterally increased that to \$10,000 in
25 presenting these, they call it these profit calculation

1 worksheets for these properties, and that there was
2 certainly no agreement by Ralph Roberts Realty to
3 increase that fee to 10,000.

4 There were also some improper calculations of
5 interest in some of these, but even with that,
6 Ledgestone and Trialwood were both profitable.
7 Firwood, Realty believes, is profitable, but Savoy
8 Defendants believe was not, and Engleman is the
9 property that I think is most in dispute here.

10 Engleman, I think Mr. Savoy testified, was
11 something -- I think he said it was a disaster, and
12 Defendants' profit calculation worksheet shows that
13 they lost \$40,000 on that property. Plaintiff contends
14 that that's not the case, that if you deduct -- or
15 essentially you credit back the things that Defendants
16 were not entitled to credit off, that the total profit
17 was about \$5,000, so that maybe there isn't a split
18 owed to the Plaintiff, but there certainly wasn't a
19 loss on a property.

20 And another overarching point that was made in
21 Mr. Roberts' trial testimony, and Mr. Confer testified
22 to this, as well, is that the investors, once they
23 purchased the property, Realty doesn't -- they can
24 advise, but the investor's in full control of the
25 property to the -- so to the extent that the property

1 was losing money, why wouldn't Defendants have
2 continued to rent it until they recouped their losses,
3 but that the Defendants were in complete control of the
4 property, and so it was -- why is it Ralph Roberts
5 Realty's fault that they overspent, they didn't rent it
6 for longer, they didn't recoup their losses? This
7 shouldn't be something that Realty is responsible for,
8 especially when this happened after the Defendants sort
9 of fired Realty, and it had no ability to advise and
10 make its opinion known about what Defendants could do
11 to maybe mitigate whenever they were claiming was a
12 loss.

13 It's undisputed, like I said, that the Savoy
14 Defendants are selling two properties on land contract,
15 Duncan and Jimmy. The testimony was a little
16 conflicting, but I think generally agreed that the
17 profit split on a land contract wasn't due until the
18 land contract was paid off, although Mr. Roberts
19 testified that in his view the split was due when the
20 balance of the land contract equaled the split. So in
21 other words, they could then pay at that time, and they
22 could transfer the land contract balance over, but it
23 was certainly clear that that balance is due sort of
24 more at the end of the land contract than when the
25 properties initially sold.

1 It was also uncontroverted that Irene and
2 Teppert haven't been sold yet, and that to the extent
3 they are sold, the program provides that 30 percent of
4 the net profit would be owing to Realty.

5 THE COURT: Now, on those unsold properties,
6 I assume you're (unintelligible) to a declaratory
7 judgment there, not any sort of money judgment yet,
8 because you don't know --

9 MS. MCCOLLUM: Correct. Absolutely.

10 THE COURT: -- yet, what the -- what the
11 profit will be in them?

12 MS. MCCOLLUM: Correct. That's absolutely
13 right. As of now, we think the property -- we think
14 the profits are -- I think we provided some estimates
15 in a briefing. Defendants, I think, don't agree with
16 that, although the two parties did present fairly
17 similar views as to what the properties were worth at
18 this time, but if they're not sold today, there's no
19 way to know what that profit would be. So yes, Your
20 Honor, we're looking for a declaratory judgment that,
21 upon sale, 30 percent of the net profit is owed to
22 Ralph Roberts Realty.

23 And we're certainly also looking for a
24 judgment in these -- with Irene and Teppert, that these
25 are rental properties, so most of the expenses aren't

1 entitled to be deducted against the split by
2 Defendants.

3 And I've -- most of the property loss and
4 profit issue was a very contentious. Plaintiff has
5 submitted a number of exhibits, and rests on the
6 testimony of Mr. Roberts, as to what the properties
7 were worth, what they were sold for, what the
8 appropriate deductions were and warrant.

9 Mr. Savoy, obviously his testimony is in
10 diametrical opposition to everything Mr. Roberts said,
11 and this is an issue for the Court, is essentially a
12 credibility issue as to which of the two sides is more
13 persuasive on the terms of the program, and whether
14 each of these properties had gains or losses.

15 I think it's fairly undisputed at this point,
16 that Duncan and Jimmy will return a profit. There's a
17 dispute between Plaintiff and Defendant as to what that
18 profit would be.

19 I think it's also somewhat in dispute as to
20 whether Irene and Teppert, if they were sold today,
21 would return a profit, but certainly the longer they're
22 rented, the more likely a profit would be. Plaintiff
23 believes they're profitable now. Defendant does not, I
24 think.

25 So, in terms of the factual issues, proposed

1 findings of fact, that's -- that is my argument on
2 those points. We believe we have met our burden to
3 show that these properties were profitable and the
4 amounts are owed. I've discussed the legal issue of
5 setoff and why we think that setoff is not available to
6 Defendants for a variety of reasons.

7 The Defendants, in their post-trial briefing,
8 raised essentially a breach of contract issue, that
9 they should not be liable to Plaintiffs because
10 Plaintiffs breached their agreement to provide
11 profitable investment properties, and Realty believes
12 that it did not breach its contract. It provided
13 investment opportunities to Defendants. Defendants
14 were under no obligation to buy any particular
15 property. They chose the properties they bought.

16 Mr. Savoy testified that he has 35 years of
17 experience in the real-estate market --

18 THE COURT: But he disputes the guaranteed
19 profitability, right?

20 MS. MCCOLLUM: Correct. Absolutely.

21 THE COURT: Yeah.

22 MS. MCCOLLUM: But this is an investor
23 program, and it's caveat emptor. You buy your
24 investment and hopefully it makes money and everybody
25 else has made money, but we don't -- certainly,

1 Plaintiff can't guarantee anything. It's real estate.
2 It's inherently volatile, and in some ways it's
3 inherently more volatile than a lot of other
4 investments.

5 At this point, again, Plaintiff believes that
6 it did not breach its investor contract. It provided
7 profitable property opportunities and didn't provide
8 any kind of guarantee that the Defendants were in full
9 control of what they bought and when, and how to manage
10 their properties, and that to the extent they did a
11 poor job of managing the properties that they had, that
12 this is not a breach of Realty's portion of its
13 investor contract, especially if losses were incurred
14 after they filed -- fired Realty, so -- and that Mr.
15 Savoy certainly is an experienced real estate
16 professional, knew of the pitfalls of real estate, that
17 properties can be damaged by tenants, that properties
18 can be in terrible shape when you buy them at a
19 sheriff's sale, that the various cities have various
20 requirements in order to sell properties, that all of
21 these things were not breaches by Mr. Roberts, that he
22 provided the information that he agreed he would
23 provide, and that the properties were all capable of
24 returning a profit.

25 And then finally, as I've touched on before,

1 Defendants have made an issue of Mr. Roberts'
2 credibility. We believe Mr. Roberts' testimony was not
3 contradictory and was consistent, and that the weight
4 of the evidence, as testified to by Mr. Confer and Mr.
5 Roberts, establishes the terms of the investor program,
6 such that Defendants are liable to Plaintiffs for their
7 participation in, and failure to pay realty profit
8 splits on the properties that were sold, and failure to
9 -- and continuous failure, I guess, to pay on the
10 properties that have not yet been sold.

11 THE COURT: All right. Thank you.

12 Mr. Kwiatkowski?

13 MR. KWIATKOWSKI: Thank you, Your Honor.

14 Your Honor, the first thing I wanted to
15 discuss for the Court, was reading at -- I guess, the
16 deal between the parties, and if there was ever an
17 actual meeting of the minds between the parties. It
18 seems that we have two very diametrically opposed
19 viewpoints on the most material terms of the contract
20 here.

21 We have the Plaintiff's proposition that net
22 profit is derived from two separate calculations, a
23 foot split, excuse me, a flip split or a rental split.
24 It's my client's proposition that there was only one
25 way, and there was always one way, and the difference,

1 the big difference, is the discussion of the expenses.

2 My client's proposition is that any and all
3 expenses used in the sale, disposition can be credited
4 against any future net profit splits. Realty, the
5 Plaintiff, takes a different viewpoint.

6 Next, the parties did agree on the
7 acquisition fees, and there was never a disagreement
8 there.

9 Thirdly, the parties had a dispute regarding
10 losses. It was discussed quite a bit by the Court and
11 by the Plaintiff in her closing arguments, however, the
12 loss is a very key point of the case. It was a key
13 point to my client. He's a sophisticated real estate
14 investor.

15 To let a -- You know, just to preface that,
16 he's a commercial real estate investor. He sought out
17 Mr. Roberts due to his alleged expertise in the
18 residential real estate and foreclosure.

19 My client does have 35 years of experience in
20 commercial leasing and commercial real estate, however,
21 admittedly, he was a novice in the residential and
22 foreclosures, and the sale and the flipping techniques
23 that Mr. Roberts set forth in this program. So it was
24 crucial to my client to discuss losses and whether or
25 not they were part of the program, and I think we've

1 made it clear from the beginning, that it always was a
2 part of the program, pursuant to my client, and Mr.
3 Roberts vehemently disagrees with that statement.

4 Thirdly, my client's -- a crucial part of the
5 agreement was finding profitable properties. In this
6 case it's our contention that the Defendant did not
7 find profitable properties, and therefore, he breached
8 his agreement.

9 So we have an agreement between the parties
10 but, in essence, the most important terms, how the
11 profit is calculated, how the houses are found, there's
12 never been an agreement as to those terms, so without
13 an agreement to those terms, I don't believe there's an
14 underlying contract that can be in force there, and the
15 Court has the ability to unwind the demons and let the
16 parties stay where they are at this moment, and that's
17 what I would ask the Court to find, because there was
18 never a meeting of the minds, and it can easily be seen
19 by the completely inapposite testimony from Mr. Roberts
20 and Mr. Savoy, discussing the terms of the agreement.

21 It was clear --

22 THE COURT: What was -- There's a conflict in
23 the evidence regarding what the parties agreed to
24 orally, isn't there? Or you're saying there's not a
25 conflict in the evidence about what they discussed, and

1 based on what they discussed, they did not agree on
2 certain key terms, therefore, no enforceable contract.

3 MR. KWIATKOWSKI: Correct.

4 THE COURT: Is it the latter that you're
5 saying?

6 MR. KWIATKOWSKI: Well, it was kind of
7 surprising to my client and myself to even know of this
8 new flip split and rental split. So when Mr. Roberts
9 was testifying as to that, Mr. Savoy's reaction was,
10 "This is the first time I've ever heard this." I
11 wasn't -- "That was never the deal."

12 So, if Mr. Roberts contends -- the Plaintiff
13 contends that that was the contract, then I don't
14 believe there is a contract.

15 THE COURT: Well, the alternative would be,
16 from your perspective would be not that there's no
17 contract, but that there's a contract that does not
18 include this distinction that the Plaintiff is claiming
19 between flip splits and (unintelligible) splits, for
20 purposes of calculating the profit split.

21 MR. KWIATKOWSKI: Potentially, yes.

22 THE COURT: So which is it, in your view?
23 What is the Defendant -- What is the defense intending
24 on that?

25 MR. KWIATKOWSKI: I can -- The Defendants'

1 contention is that there is no contract because there
2 was no meeting of the minds on that material term. If
3 we're talking about how the net profit is calculated,
4 and the net profit is calculated based on the expenses,
5 and the expenses are one thing that my client has
6 always said, "These are the expenses," and the
7 Plaintiff has some diametrically opposing viewpoint,
8 there was never a meeting of the minds.

9 THE COURT: And therefore, the Court should
10 find there is no enforceable contract at all, and
11 therefore, Plaintiff takes nothing and everybody goes
12 their separate ways?

13 MR. KWIATKOWSKI: Correct.

14 THE COURT: All right. Go ahead.

15 MR. KWIATKOWSKI: The second -- If the Court
16 is so -- is inclined to not find that, the next
17 contention from the defense, is that if there were a
18 contract, that the Plaintiff breached that contract.
19 It was absolutely crucial, testified to as by Mr.
20 Savoy, that finding profitable properties was
21 important. The business model that the Plaintiff would
22 want the Court to believe, is that they collect \$5,000,
23 when, lose or draw. So it could be a diamond in the
24 rough or it could be the -- a house that needs to be
25 completely rebuilt and needs city certifications and

1 everything else, or literally a house filled with human
2 waste, and Plaintiff gets his \$5,000, win, lose or
3 draw, and potentially a commission was their argument,
4 and then according to the Plaintiff, they don't share
5 in any losses, they don't have any problems. They
6 collect 30 percent and move on their merry way.

7 I mean, dealing with a -- the investor, like
8 the Defendants here, that proposition doesn't seem very
9 good. If I were a Plaintiff, that would be the world's
10 greatest deal and people should be lined up around the
11 blocks to do it, but I don't -- or lined up around the
12 blocks looking for jobs because there's no way to lose.

13 Plaintiff testified he's bought a thousand
14 homes. That's \$5 million for finding houses. Where is
15 the incentive to find profitable properties? That's
16 why my client --

17 THE COURT: Well, I suppose one incentive for
18 Plaintiff to do that, and to kind of help through that
19 is to keep their -- the participants in the investor
20 program coming back, and participating and buying more
21 properties, and keeping it going.

22 MR. KWIATKOWSKI: Could be, or it could be he
23 could find a mass amount of properties and find new
24 investors with the same spiel, and saying this is the
25 greatest deal on Earth and collect another \$5,000 for,

1 in essence, working a computer, and having to do little
2 to nothing else except for scour Sheriff's Deeds and
3 send out lists. I mean, that's -- seems like a pretty
4 good business model, and that's why it bears to the
5 conscience of why would my client ever agree to such a
6 deal, and he didn't. My client agreed to deal with
7 expenses and 100 percent of loss shares. Why was that?
8 Why did Mr. Roberts agree to a deal, in my opinion, and
9 the defense contention is that he was desperate. He
10 testified he needed the Defendants' participation, and
11 that's why when we talk about Ray Confer's testimony,
12 really has nothing to do with the potential deals or
13 contacts with my client. He testified that he has no
14 idea what claims, what deal, what went on with my
15 client.

16 So anything that Mr. Confer says really has
17 nothing to do with this case whatsoever. His testimony
18 wasn't relevant as to the defense, so the idea that the
19 Plaintiff wouldn't share in any downside, and wouldn't
20 seek out profitable -- would only seek out profitable
21 properties, is something that my client was up front
22 and needed at the beginning, and as soon as the
23 acquisition fees -- and they stopped buying properties,
24 the level of service that they required, the honesty,
25 integrity, follow-up, those types of things fell off

1 the face of the Earth because they weren't paying that
2 \$5,000 anymore. There wasn't a need for it anymore.
3 The properties that they had bought were not
4 profitable, so Mr. Roberts' follow-up duty of care all
5 went out the window.

6 And at the same point is when, at the
7 beginning, which is, you know, in the evidence where it
8 was testified that Mr. Savoy and the Defendants were
9 one of the first participants, I think there might have
10 only been one other, and that was Mr. Confer, and Mr.
11 Savoy, as part of this deal said, "We wanted the right
12 of first refusal," and as soon as they stopped buying
13 and as soon as other investors were involved, the right
14 of first refusal stopped.

15 So, based on the findings that Mr. Savoy and
16 his -- the other parties, the defense here, had at
17 least four properties that they took a considerable
18 bath on, based on our calculations about \$65,000, the
19 Plaintiff breached his duty because he had no incentive
20 to find profitable properties because all he had to do
21 was sit back and collect the \$5 million in acquisition
22 fees. So he breached his duty. Therefore, the Court
23 should find that -- suspend future performance on any
24 further issues.

25 A lot has been talked about regarding the

1 testimony between Mr. Roberts which -- I believe he
2 said he had been in the real estate business since
3 1975, and Mr. Savoy, who testified he had been involved
4 in real estate for over 30 years. There's plenty of
5 case law out there that says when two equally -- What's
6 the exact wording? Where two equally credible
7 witnesses give contradictory testimony, that the
8 plaintiff has not met his burden.

9 In this case, even if we found that Mr.
10 Roberts was credible, which we don't believe, and I'm
11 going to just highlight a few portions in the second,
12 is that even if we found he was 100 percent credible,
13 that they still have not met their burden, and
14 therefore, you have to find in favor of the Defendants,
15 but let's just segue a little bit, into Mr. Roberts'
16 credibility.

17 One, the October 7, 2013 affidavit couldn't be
18 more clear. The investor program has no provision of
19 sharing of losses, and it's the paragraph 23. That was
20 signed October 7, 2013.

21 What's interesting about that date is that it
22 was before the defense filed a reply brief, I believe,
23 which, through its due diligence, went, ordered a
24 transcript from the Roger Roberts case, and found he
25 testified diametrically opposing that. So as soon as

1 we brought it to the Plaintiff's attention that Mr.
2 Roberts had a little bit of a propensity for
3 untruthfulness, all of the sudden the story changed and
4 the wordsmith (phonetic) happened of, "Well, I really
5 didn't mean that," and, "That's not what I said," and
6 "That was for this case." It's clear, he was trying to
7 advance a position and got caught. His position was
8 always, "We didn't share losses in this case." As soon
9 as we found evidence where he asserted otherwise, lo
10 and behold, it all changed just like in the same
11 affidavit on pages -- I think paragraph 49 and
12 paragraph 53, where he discussed a lowball sale based
13 on the valuations of Realty on, I believe it's
14 Ledgestone and Firwood, and that the Defendant
15 specifically undersold those properties. However, we
16 then provided emails from the Plaintiff, that we
17 actually sold the properties for more than the
18 valuations that they gave and, lo and behold, that
19 defense was and never brought up again and never
20 discussed. It just shows the propensity for --

21 THE COURT: Well, just a minute.

22 MR. KWIATKOWSKI: -- untruthfulness. Sorry.

23 THE COURT: You're talking about paragraphs
24 49 and 53 of the --

25 MR. KWIATKOWSKI: The affidavit.

1 THE COURT: -- October 7, 2013 affidavit of
2 Ralph Roberts?

3 MR. KWIATKOWSKI: Yes.

4 THE COURT: Is that right?

5 MR. KWIATKOWSKI: I believe so.

6 THE COURT: Did you -- As I pointed out
7 earlier, that exhibit was never -- Exhibit S was never
8 admitted into evidence in the trial of this case.
9 Rather, you -- the witness was questioned -- Ralph
10 Roberts was questioned about particular provisions in
11 that affidavit, and that's the only way that those
12 provisions had come into evidence in this trial.

13 Was there any questioning regarding
14 paragraphs 49 and 53?

15 MR. KWIATKOWSKI: I don't think so, Your
16 Honor.

17 THE COURT: So should I ignore what you just
18 argued regarding those paragraphs, because it's not in
19 the record, not in evidence?

20 MR. KWIATKOWSKI: I'm trying to recall if
21 questions were specifically asked. I don't think they
22 were.

23 THE COURT: Paragraph 23 is because you asked
24 Mr. Roberts questions about it, and so did Ms. McCollum
25 during the trial, his testimony.

1 MR. KWIATKOWSKI: I don't believe I asked
2 questions about 49 or 53.

3 THE COURT: All right. Well, go on.

4 MR. KWIATKOWSKI: I believe Mr. Savoy
5 testified regarding the valuations in Exhibit P, and I
6 believe it's Exhibit O, I don't have the cites in front
7 of me, but I believe Mr. Savoy testified that, you
8 know, they sold they sold than the properties for more
9 than the price that Mr. Roberts advised, but needless
10 to say, I believe the whole fact of Mr. Roberts'
11 conflicting testimony regarding the facts of the loss
12 split speak for themselves. It's blatant. It's a
13 blatant, untruthful statement. It's a blatant,
14 untruthful affidavit with him trying to advance a
15 position until he got caught. It was clear the way the
16 pleadings and the motions were filed in this case,
17 until I filed a pleading that brought up the facts, or
18 put Mr. Roberts on notice that I was aware of the fact
19 that he was never going to bring that up because there
20 was positions -- the program doesn't share losses.

21 Next thing I want to discuss is evidence the
22 Plaintiff submitted, or lack thereof, to hold Mr.
23 Savoy, Mr. Arnold Hassig and Mr. Adam Hassig personally
24 liable, because there was none. I don't think Mr. Adam
25 Hassig was mentioned once in the entire trial. I don't

1 even really know why he's a named Defendant.

2 Mr. Arnold Hassig was mentioned, that he was
3 unable to talk, so Plaintiff dealt with Mr. Savoy, and
4 Mr. Savoy made a business deal regarding properties
5 that they were purchasing. He never personally
6 guaranteed any of -- He never personally guaranteed the
7 business deal, so Mr. Savoy should not be held
8 personally liable. This was always a personal -- This
9 was always a business deal, and not a personal
10 obligation of Mr. Savoy. Mr. Savoy did not make a
11 deal. He made a business deal regarding LLCs.

12 THE COURT: By "business deal" you mean --

13 MR. KWIATKOWSKI: Yes.

14 THE COURT: -- designed to be a deal between
15 a Plaintiff and some entity that Mr. Savoy had an
16 interest in?

17 MR. KWIATKOWSKI: Correct.

18 THE COURT: Only?

19 MR. KWIATKOWSKI: Correct.

20 THE COURT: Is that right?

21 MR. KWIATKOWSKI: Correct.

22 THE COURT: All right. Go ahead.

23 MR. KWIATKOWSKI: The final argument is that
24 the Plaintiffs are, I'm sorry, the Defendants are
25 entitled to a setoff. It was always part of the deal

1 that 100 percent of the losses are able, in aggregate,
2 to be setoff against any future profits. We don't even
3 know if there will be future profits. Our contention
4 is, is that there's been \$65,000 and some change, of
5 losses, so in the future, if there are losses, that
6 there are profits that these can be setoff against, and
7 we believe we've met all of the legal ramifications.
8 And I briefed the case law regarding filing proofs of
9 claims. I briefed the case law in the De Laurentis
10 Entertainment Group case, which is 963 F.2d 1269,
11 discussed at length why we're entitled to a setoff. We
12 believe that we are --

13 THE COURT: You're referring to your --
14 primarily your summary judgment brief, right?

15 MR. KWIATKOWSKI: Summary judgment and it's
16 in the post-trial brief also.

17 THE COURT: Where is that in your post-trial
18 brief? Must be near the end of it.

19 MR. KWIATKOWSKI: Yes. It's at -- towards
20 the end.

21 THE COURT: Does that just cite the same
22 authorities --

23 MR. KWIATKOWSKI: Yes.

24 THE COURT: -- and make the same arguments
25 your summary judgment brief did?

1 MR. KWIATKOWSKI: Yes, in essence.

2 THE COURT: Oh, I see. I see you cite the
3 Suncrete case, Geltzer v. Bloom. Okay. Yeah, I see.
4 It's pages 11 and -- through 13, I guess, of your post-
5 trial brief.

6 MR. KWIATKOWSKI: So based upon the fact that
7 we believe that we're entitled to a \$65,000 setoff, the
8 Defendants have no liability to the Plaintiffs, and we
9 would ask the Court to find in favor of the Defendants.

10 And if the Court has any questions, I'm here
11 to answer them.

12 THE COURT: All right. I don't have any
13 further questions. Thank you.

14 Ms. McCollum, as I said earlier, you may
15 make, on behalf of Plaintiff, a reply or closing
16 argument if you wish to.

17 MS. MCCOLLUM: I do, and I won't burden Your
18 Honor by being very lengthy.

19 I want to address, first, the point that Mr.
20 Kwiatkowski made, that Mr. Savoy made a business deal,
21 and he clarified that was between one of his businesses
22 and Ralph Roberts Realty. If that was the case, then
23 why did Mr. Savoy, as the trial exhibits show, purchase
24 in his individual name, Firwood, Engleman, Duncan,
25 Jimmy, Irene and Teppert? If that was the case, those

1 properties should have been purchased in the name of an
2 LLC, as many of the other properties were.

3 To the --

4 THE COURT: That list of properties, again,
5 was Firwood and what?

6 MS. MCCOLLUM: Firwood, Engleman, Duncan,
7 Jimmy, Irene, Teppert. They were all purchased by Mr.
8 Savoy individually. Some of them were later
9 transferred into LLCs, but his name appears on the
10 Sheriff's Deed for those properties.

11 THE COURT: All right. Go ahead.

12 MS. MCCOLLUM: To the Savoy Defendants' point
13 that there was no incentive for Realty to provide
14 profitable properties, there are only 50 investors in
15 the investor program. There's a lot of this, as I
16 think we've said, repeat customers. People buy a lot
17 of properties. Mr. Confer certainly has something like
18 30 properties and is still continuing to invest, so to
19 the extent that the Savoy Defendants believe that
20 Realty has no incentive to provide profitable
21 properties, that's just simply not true.

22 We also, of course, dispute that they lost
23 money and that the properties that we're talking about
24 were not profitable. Certainly, the four that were
25 sold are profit -- the four that were sold and split

1 were profitable because Realty received a split.

2 Of the next four that were sold, at least two
3 were profitable. One was extremely profitable, and
4 that was the condominium. I think that's Trailwood,
5 unless I'm getting my properties confused again, which
6 is very possible. That's right.

7 And we believe that the properties that are
8 still being sold, the ones that are being sold on land
9 contract and the ones that haven't been sold yet, are
10 profitable. We think that there was a contract. It
11 was borne out by the past dealings among the parties.
12 We believe that the -- as we said in the -- our post-
13 trial brief, and Your Honor asked me before whether I
14 thought that the plan language was sufficient to bar
15 recoupment defense, and I think that is on page 19 of
16 my post-trial brief, the bolded, underlined language is
17 pretty clear that all persons and entities are
18 precluded from asserting any claim obligation, right,
19 causes of action or liability that occurred prior to
20 the petition date. So Realty certainly did intend to
21 foreclose a recoupment or setoff defense with that
22 language.

23 Otherwise, unless Your Honor has any
24 questions, I'm going to rest on my previous arguments
25 and the extensive briefing that we've all filed in this

1 case.

2 THE COURT: All right. Thank you.

3 MS. MCCOLLUM: Thanks.

4 THE COURT: All right. Thank you all.

5 Trial then -- now has fully concluded, except for my
6 decision, of course.

7 I intend, at this point, to decide this case
8 by issuing a written opinion and an accompanying
9 judgment, then give an oral bench opinion. If I change
10 my mind after today, and decide to do a bench opinion
11 instead, of course, then the parties will -- a notice
12 will be issued (unintelligible) notice of the date and
13 time for that.

14 The -- I do want to take some further time to
15 consider, reflect on the arguments -- the oral
16 arguments made today, and the closing arguments, as
17 well as the -- to continue considering the evidence
18 presented at trial and the arguments of the parties
19 presented before today's oral arguments, including the
20 arguments and points made in the post-trial briefs.

21 I would ask the parties one thing, and that
22 is, I don't know to what extent I'm going to use pieces
23 of these things, but I do -- I would ask the parties,
24 please, to submit by email, to my Courtroom Deputy,
25 Mary Vozniak, in Word Perfect or Word form, a copy of

1 your post-trial briefs which contain your proposed
2 findings of fact and conclusions of law. Those may be
3 helpful to me in preparing my written opinion,
4 including for purposes of quoting from them in places,
5 as well as possibly adopting some of the -- with some
6 change, but not a lot of change, on a piece-by-piece
7 basis, depending on what the Court ends up finding as
8 part of its findings.

9 So I would ask each side to do that. If you
10 could, some time yet this week, just send Mary Vozniak
11 an email with an attachment of your doc.

12 Is there any problem doing that?

13 MR. KWIATKOWSKI: No, Your Honor.

14 MS. MCCOLLUM: No, Your Honor.

15 THE COURT: All right. If you don't have Ms.
16 Vozniak's email address you can get it from our court
17 reporter here, but I suppose you probably do, and so I
18 would appreciate that.

19 And then in the meantime then, we're finished
20 for today and the case is taken under advisement.

21 Thank you.

22 (Proceedings concluded at 10:33 a.m.)

23

24

25

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ _____

October 14, 2014

STEPHEN C. BOWLES